No. 89-7

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IN THE

Supreme Court of the United States

GERALD LEE AND LORA LEE

Petitioners

v.

State of Arkansas,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I.

THE HOLDING BELOW, THAT THE PROSECUTION IN A STATE CRIMINAL CASE IN ARKANSAS IS NOT REQUIRED TO PUT ON ANY PROOF THAT THE OFFENSE FOR WHICH THE DEFENDANT IS CHARGED TOOK PLACE IN THE COUNTY OF PROSECUTION, IS CONTRARY TO THE DECISIONS OF THIS COURT IN *IN RE WINSHIP* AND *PATTERSON V. NEW YORK*.

II.

WHETHER THE SIXTH AMENDMENT RIGHT TO A TRIAL IN THE STATE AND DISTRICT WHEREIN THE CRIME WAS COMMITTED APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT IS AN IMPORTANT ISSUE THAT HAS NEVER BEEN ADDRESSED BY THIS COURT, AND THE HOLDING

OF THE ARKANSAS COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF THE FEDERAL COURTS.

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Opinion Below

The opinion of the Arkansas Court of Appeals is reported at *Lee v. State*, 27 Ark. App. 198, ___ S.W.2d ___ (1989). On June 14, 1989, the court denied petitioners' motion to recall mandate pending this petition for certiorari.

Jurisdiction

The Arkansas Court of Appeals decided this case on April 26, 1989. Petitioners' motion to recall the mandate was denied on June 14, 1989.

This Court has jurisdiction under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

The Fourteenth Amendment to the U.S. Constitution, § 1, provides in pertinent

part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ...

Statement of the Case

In the early part of 1987, the Arkansas State Police began an undercover investigation into alleged drug dealing in Sharp County, Arkansas and the surrounding area. It was also during this time that petitioner Gerald Lee was working for the Arkansas State Police as an informant,

providing information about drug violators.

As a part of this investigation, several investigators with the Arkansas State Police worked undercover at a house in Cherokee Village, buying and selling drugs and obtaining information. During this time, William Smith visited the drug house and sold methamphetamine and cocaine to Charles Lambert, one of these investigators. At some point, Smith told Lambert that Smith could obtain methamphetamine from Gerald Lee. Smith was charged in Sharp County based upon his drug dealings to the undercover officers at the house at Cherokee Village.

Petitioners were later charged in Randolph County with conspiracy to deliver methamphetamine and with delivery of

methamphetamine. It was contended by the State that petitioner Gerald Lee conspired with William Smith to sell methamphetamine to William Smith who would in turn sell it to others (including undercover officers with the Arkansas State Police), and that both petitioners delivered methamphetamine to William Smith.

At trial, the testimony of William Smith was that a meeting was held at his home in Jonesboro, Arkansas in January of 1987, which was attended by himself, Gerald Lee, Larry Farley, Brad Powell, and Marty Herndon, and that at that meeting Gerald Lee sold several ounces of methamphetamine. Smith testified that he obtained some of the methamphetamine from Lee, sold it to others, and gave the money to Lee.

The testimony of the other State's witnesses was to the same effect: that a meeting was held at Smith's residence and that methamphetamine was transferred by Gerald Lee to some of them.

William Smith and his wife, Vivian Smith, also testified that Lora Lee had made two unidentified deliveries in Randolph County at some undisclosed point in time.

The appellants testified and denied any delivery of drugs or conspiracy. They also contended that Smith's accomplice testimony was not sufficiently corroborated to go to the jury.

The jury convicted Gerald Lee of conspiracy to deliver a controlled substance and delivery of the controlled substance. Lora Lee was convicted of the

conspiracy charge but acquitted of delivery.

On appeal, petitioners argued that the only testimony establishing that an overt act occurred within the county of prosecution came from accomplices William and Vivian Smith, and since under Arkansas law a conviction may not be sustained upon uncorroborated accomplice testimony, the evidence was insufficient to establish the crime of conspiracy. The Arkansas Court of Appeals rejected the argument, holding that even though an accused is entitled to a jury trial in the county where the offense was committed, the State is not required to put on any proof that the offense was committed in the county of prosecution unless the evidence affirmatively shows that it was not.

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING BELOW, THAT THE PROSECUTION IN A STATE CRIMINAL CASE IN ARKANSAS IS NOT REQUIRED TO PUT ON ANY PROOF THAT THE OFFENSE FOR WHICH THE DEFENDANT IS CHARGED TOOK PLACE IN THE COUNTY OF PROSECUTION, IS CONTRARY TO THE DECISIONS OF THIS COURT IN *IN RE WINSHIP* AND *PATTERSON V. NEW YORK*.

This petition presents a straightforward challenge to the manner in which the Arkansas courts allocate the burden of proof on the questions of jurisdiction and venue. Ark. Code Ann. § 5-1-111 (1987)

provides in relevant part:

> (a) Except as provided in subsections (b), (c), and (d) of this section, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:
>
> (1) Each element of the offense;
>
> (2) Jurisdiction;
>
> (3) Venue; and
>
> (4) The commission of the offense within the time period specified in § 5-1-109.
>
> (b) The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

Applying this statute, the court below held:

> [A]lthough a person accused of criminal conduct is entitled to a jury trial in the county where the offense was committed, the state is not required to offer *any* proof that the offense was committed in the county of prosecution unless the evidence affirmatively shows that it was not . . . . Lack of proof that proper venue is in the county of prosecution is not the equiva-

> lent of an "affirmative showing."

Lee v. State, 27 Ark. App. 198, 206, ___ S.W.2d ___, ___ (1989) (citations omitted).

In *In re Winship*, 397 U.S. 358, 364 (1970), this Court explicitly held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This protection is not limited to those facts which, if not proved, would wholly exonerate the defendant; *Mullaney v. Wilbur*, 421 U.S. 684 (1975); but applies to all of the elements included in the definition of the offense and requires the prosecution to prove them all beyond a reasonable doubt.

Patterson v. New York, 432 U.S. 197 (1977).

In Arkansas, the state legislature has provided that jurisdiction and venue are facts which must be proved beyond a reasonable doubt. Ark. Code Ann. § 5-1-111(a) (1987). This is tantamount to making jurisdiction and venue elements of the offense. Yet, in subsection (b) of that statute the legislature has provided that such facts are presumed. Thus, under the statute, and the holding of the court below applying it, the State is entitled to a presumption that facts exist which must be proved beyond a reasonable doubt. This makes no sense and violates due process because it places the burden upon the defendant to make an affirmative showing that jurisdiction and venue lie

outside of the county of prosecution.

Ark. Code Ann. § 5-1-111(b) (1987), and the decision below applying it, are thus contrary to the reasoning of *Winship*, *Mullaney*, and *Patterson*. This Court should grant the writ.

II.

WHETHER THE SIXTH AMENDMENT RIGHT TO A TRIAL IN THE STATE AND DISTRICT WHEREIN THE CRIME WAS COMMITTED APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT IS AN IMPORTANT ISSUE THAT HAS NEVER BEEN ADDRESSED BY THIS COURT, AND THE HOLDING OF THE ARKANSAS COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF THE FEDERAL COURTS.

The sixth amendment gives a criminal

defendant the right to a trial by an impartial jury "of the State and district wherein the crime shall have been committed, . . ." Thus far, this Court has never resolved the question whether this venue provision is applicable to the states.

At least one federal court has addressed this issue, however. In *Cook v. Morrill*, 783 F.2d 593 (5th Cir. 1986), the Fifth Circuit Court of Appeals held that the venue provision does not apply to the states. Citing its earlier decision in *Martin v. Beto*, 397 F.2d 741 (5th Cir. 1968), the court stated:

> We believe that the court in *Martin v. Beto* correctly decided the issue and that the Supreme Court, if it is ever faced with the issue, would hold that the right of vicinage does not apply to the states. The

> Supreme Court has applied to the states only those provisions of the sixth amendment that the Court finds "fundamental and essential to a fair trial." *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799, 804 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)). The right to a trial in the district where the defendant committed the crime is not one of those rights which rises to the level of being "fundamental and essential to a fair trial."

In light of *United States v. Johnson*, 323 U.S. 273 (1944), the Fifth Circuit's reasoning and conclusion are plainly wrong. In its discussion of the venue question in *Johnson*, this Court stated:

> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. . . . Questions of venue in

> criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.

323 U.S. at 276.

Proper venue in a state criminal case is not a mere formality but helps protect the fundamental fairness of the trial. Placing some limits upon the place where the case will be tried is necessary to ensure that the defendant does not suffer undue hardship. *See United States v. Cores*, 356 U.S. 405, 407 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.")

Johnson and *Crews* both support the conclusion that a criminal defendant's

right to a trial where the crime was committed is fundamental and should be held applicable to the states. The court below denied petitioners of that right by holding that venue in a conspiracy trial properly lies at a situs where proof of an overt act in furtherance of the conspiracy was insufficient as a matter of law.

C O N C L U S I O N

The writ of certiorari should be granted.

Respectfully submitted,
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A P P E N D I X

Gerald LEE and Lora Lee *v.* STATE of Arkansas

CA CR 88-156

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

1. CRIMINAL LAW — ACCOMPLICE TESTIMONY. — A conviction cannot be had in the case of a felony on the testimony of accomplices unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. [Ark. Code Ann. § 16-89-111(e)(1) (1987).]
2. CRIMINAL LAW — SUFFICIENCY OF ACCOMPLICE TESTIMONY. — Evidence corroborating the testimony of an accomplice must be more than testimony sufficient to show that the offense was committed; it must tend to connect the accused with the crime and must be independent of the evidence given by the accomplice, and it may be circumstantial so long as it is substantial, but it need not be of such substantial character as to support a conviction without the testimony of the accomplice.
3. CRIMINAL LAW — NO CORROBORATION OF CRIME CHARGED — CONVICTION REVERSED AND DISMISSED. — Where the only non-accomplice testimony relating to delivery by appellant was about deliveries in counties other than the county named in the information, and where the only evidence that appellant delivered controlled substances in the named county was that of appellant's accomplice, the conviction of appellant for delivery of a controlled substance was reversed and dismissed because of a lack of evidence corroborating the accomplice's testimony.
4. CRIMINAL LAW — CONSPIRACY — WHAT THE STATE MUST PROVE. — Under Ark. Code Ann. § 5-3-401 (1987), the State is required to prove both that there has been an agreement of the parties to commit the crimes and that one of the conspirators did at least a minimal act in furtherance of that agreement.
5. CRIMINAL LAW — PROOF OF CONSPIRACY — USE OF DIRECT EVIDENCE. — Due to the very nature of a criminal conspiracy, it is not necessary that a conspiracy to commit an unlawful act be shown

by direct evidence; it may be proved by circumstances and the inferences drawn from the course of conduct of the alleged conspirators.

6. CRIMINAL LAW — PROOF OF CONSPIRACY — CONSPIRACY MAY BE INFERRED. — The conspiracy may be inferred, even though no actual meeting among the parties is proved, if it be shown that two or more persons by their acts pursued the same unlawful object, each doing a part so that their acts that were apparently independent were in fact connected.
7. CRIMINAL LAW — CONSPIRATORS LIABLE FOR EACH OTHER'S ACTS. — Where the combination of persons to do an unlawful act is shown, each of them is liable for the acts of the other acting in furtherance of the plan where it terminates in a criminal result.
8. CRIMINAL LAW — CORROBORATION OF VENUE OR JURISDICTIONAL FACTS IS NOT REQUIRED. — The corroboration required by statute relates to the material facts that go to the "identity of the defendant in connection with the crime"; the statute is directed toward proof of the criminal offense and not to venue or jurisdictional facts, for which corroboration is not required.
9. CRIMINAL LAW — PROOF OF VENUE NOT REQUIRED UNLESS EVIDENCE AFFIRMATIVELY SHOWS CRIME WAS NOT COMMITTED IN THAT COUNTY. — Although a person accused of criminal conduct is entitled to a jury trial in the county where the offense was committed, the State is not required to offer any proof that the offense was committed in the county of prosecution unless the evidence affirmatively shows that it was not. [Ark. Code Ann. § 5-1-111(b) (1987).]
10. VENUE — CRIMINAL CASE — LACK OF PROOF NOT SAME AS AFFIRMATIVE SHOWING. — Lack of proof that proper venue is in the county of prosecution is not the equivalent of an "affirmative showing."
11. VENUE — CONSPIRACY. — Proper venue for a conspiracy prosecution is in any county where an overt act in furtherance of the conspiracy is alleged to have occurred.
12. CRIMINAL LAW — CONSPIRACY TO COMMIT A CONTINUING SERIES OF OFFENSES — STATUTE RESTRICTING CONVICTION TO ONLY CRIME IF ONE IS CONSPIRACY DOES NOT APPLY TO CONSPIRACY TO COMMIT A CONTINUING SERIES OF OFFENSES. — Although Ark. Code Ann. § 5-1-110 (1987) provides that, when the same conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for all of the offenses but convicted of only one if one offense consists only of a conspiracy, solicitation, or an attempt to commit the other, that statute has no application to a conspiracy to commit a continuing series of offenses.

13. CRIMINAL LAW — WITNESS'S STATUS AS AN ACCOMPLICE — USUALLY A MIXED QUESTION OF LAW AND FACT. — Ordinarily, the question of whether a witness is an accomplice is a mixed question of fact and law and must be submitted to the jury where the evidence is in dispute.
14. APPEAL & ERROR — FAILURE TO PRESERVE ISSUE OF ACCOMPLICE STATUS OF A WITNESS FOR APPEAL. — On appeal, appellant cannot challenge the sufficiency of the evidence to corroborate an alleged accomplice's testimony where appellant requested neither a directed verdict nor a jury instruction on this issue but merely moved for a directed verdict on the "whole evidence."
15. CRIMINAL LAW — ACCOMPLICE STATUS WAS A QUESTION OF FACT FOR THE JURY. — Where a witness asserted that she did not participate in the sale of or the conspiracy to sell drugs but merely accompanied her husband to the sale, the issue of her status as an accomplice was a question of fact for the jury to decide.
16. CRIMINAL LAW — CONSPIRACY — SUFFICIENT CORROBORATION OF ACCOMPLICE TESTIMONY. — Where a witness's status as an accomplice was a question of fact for the jury, the jury could have found that the witness was not an accomplice and that her testimony need not be corroborated, and she testified to facts from which the jury could infer that appellant had been a participant in the conspiracy, the testimony of the witness, standing alone, was sufficient to support the verdict as to appellant and to fully corroborate the accomplice's testimony.
17. EVIDENCE — CHARACTER EVIDENCE. — Ark. R. Evid. 404(a)(1) and 405(a) permit an accused to initiate evidence of his character or a pertinent character trait by reputation or opinion evidence; however, when he puts his character in evidence, inquiry into relevant, specific instances of conduct is allowable on cross-examination, and the only limitation the rule places on cross-examination is that the facts inquired into be relevant to the issue of character.
18. EVIDENCE — CHARACTER EVIDENCE — CROSS-EXAMINATION — INQUIRY INTO SPECIFIC ACTS OR THREATS OF VIOLENCE BY APPELLANT RELEVANT. — The fact that both appellants had been engaged in acts or threats of violence was relevant to the witnesses' opinions and knowledge of appellants' reputation for being law-abiding citizens.
19. EVIDENCE — CROSS-EXAMINATION OF CHARACTER WITNESS ABOUT A PRIOR CONVICTION OF APPELLANT'S — RELEVANCE OF AGE OF CONVICTION. — Although cross-examination of a witness about his own convictions that are more than ten years old is not allowed under Ark. R. Evid. 609, that time restriction does not apply where

character witnesses are cross-examined about their knowledge of appellant's prior convictions, a situation governed by Ark. R. Evid. 405, which merely requires the evidence to be relevant.

20. EVIDENCE — PROOF OF AGE OF CONVICTION NOT INTRODUCED — APPELLANT'S BURDEN TO BRING UP RECORD AND ABSTRACT SUFFICIENT TO DEMONSTRATE THAT THE TRIAL COURT ERRED. — Since the burden is on the appellant to bring up a record and abstract thereof sufficient to demonstrate that the trial court erred, the appellant failed in that burden by failing to introduce documentary evidence or any other evidence to prove that appellant's conviction, about which witnesses were cross-examined, was over forty years old.

21. EVIDENCE — CROSS-EXAMINATION OF CHARACTER WITNESSES ABOUT PRIOR CONVICTION OF APPELLANT WAS NOT IN BAD FAITH. — All but one witnesses' admitting that he was aware of all of those matters about which inquiries were made, and the one witness's not being aware of only one act, about which appellant's own counsel admitted there was information in the file negated any basis for an argument that the inquiries were merely suggestive or based on insinuation or innuendo.

22. CRIMINAL PROCEDURE — CONSPIRACY — STATE MAY PROVE OVERT ACTS NOT LISTED IN INFORMATION. — Where the amended information charged appellant with conspiracy to deliver a "Schedule II controlled substance," which includes both methamphetamine and Dilaudid, but when listing overt acts done in furtherance of the conspiracy pursuant to Ark. Code Ann. § 16-89-112(b) (1987), the state listed the delivery of methamphetamine without listing Dilaudid, the state could still offer evidence of other overt acts other than the ones listed in the indictment or information.

23. EVIDENCE — OTHER CRIMES EVIDENCE — CONSPIRACY — RULE NOT APPLICABLE TO PROOF OF OVERT ACTS OTHER THAN THOSE LISTED IN THE INFORMATION. — Proof that appellant delivered Dilaudid to an accomplice pursuant to the conspiracy was properly admitted as direct evidence of conspiracy to deliver a "Schedule II controlled substance," the crime with which appellant was charged, and the delivery of Dilaudid was not "other crimes evidence" but evidence of an overt act, other than that alleged in the information, done in furtherance of the conspiracy.

24. EVIDENCE — LEADING QUESTIONS — TRIAL JUDGE HAD WIDE DISCRETION TO CONTROL. — The trial court is vested with a wide latitude of discretion with regard to admission of leading questions, and it's rulings will not be disturbed on appeal unless there has been an abuse of discretion.

25. TRIAL — CONTROL OF TRIAL TACTICS — LEADING QUESTIONS — NO PREJUDICIAL ERROR. — Although the trial judge has an obligation to control trial tactics that tend to substitute counsel's evidence for that of his witness and leave the jury with prejudicial impressions, where the leading questions in most instances were not substitutions of counsel's statements for witnesses' evidence, but repetitions of witnesses' testimony or corrections of it in minor details, and where appellants' counsel was content with the rulings he asked for and obtained when he objected to the leading questions, and no requests for admonishment of counsel or any other sanctions were made, the appellate court could not conclude that the conduct of trial counsel or the questions asked here reached the prejudicial level found in *Alexander* v. *Chapman*, 289 Ark. 283, 711 S.W.2d 765 (1986), or that the trial court otherwise committed prejudicial error by not acting *sua sponte* under the circumstances of this case.

Appeal from Randolph Circuit Court; *Harold Erwin*, Judge; affirmed in part; reversed and dismissed in part.

John Wesley Hall, Jr., and *Craig Lambert*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. By an information filed in Randolph County, Arkansas, appellants Gerald and Lora Lee were charged with the crimes of delivery of a controlled substance and conspiring with one William Smith to engage in a continuing series of offenses of delivery of controlled substances. The jury returned a verdict finding Gerald Lee guilty of both charges. It found Lora Lee guilty of conspiracy but not guilty of delivery. On appeal, the parties advance several points for reversal, which we will discuss separately. We find sufficient merit to warrant reversal in appellant Gerald Lee's contention that the evidence is insufficient to sustain his conviction of *delivery* of a controlled substance, but in all other respects we affirm the jury's verdict.

It was the State's theory of the case that Gerald Lee and William Smith entered into a conspiracy under which it was agreed that Lee would furnish controlled substances to Smith who would in turn sell the contraband and divide the proceeds with Lee. The State further contended that Lora Lee was either an original conspirator or later joined and participated in that conspiracy. The case was submitted to the jury on the theory that

the conspiracy contemplated that the parties would commit a continuing series of offenses, and that on at least one occasion appellants delivered a controlled substance to Smith in Randolph County.

William Smith testified that in March of 1987 he was contacted for the purpose of selling controlled substances for Gerald Lee, and that he thereafter agreed with Lee that Lee would furnish the contraband, Smith would sell it, and the proceeds would be divided. In furtherance of the conspiracy, he had sold over $30,000.00 worth of contraband delivered to him by Lee, and had divided the proceeds with the Lees. Smith stated that each time he delivered proceeds he was furnished with more contraband for sale on the same basis. According to Smith, the contraband was delivered to him by both Gerald and Lora Lee at different times and places. He had delivered the money to Gerald and Lora on some occasions, to Gerald alone on some, and to Lora alone on others. Both Lora and Gerald Lee had brought contraband to his home in Jackson County and, on at least two occasions, deliveries to Smith took place in appellants' home in Randolph County, where appellants kept a supply of contraband in a freezer.

Smith also testified to various specific incidents demonstrating the conspiracy and Gerald Lee's participation therein. Most material aspects of that testimony were corroborated by a number of witnesses..

Vivian Smith testified that her husband had sold "dope" for Lee on a large scale and obtained deliveries of it from both of the Lees in various places. She stated that the deliveries were made in Randolph County on at least two occasions in exchange for the proceeds of previous sales. She also testified that the supply of contraband was kept in a freezer in the Lees' home in Randolph County. Although she admitted going along with her husband on several trips, she denied any participation in the conspiracy.

I. DELIVERY

Appellant Gerald Lee first contends that his conviction for delivery of a controlled substance cannot be sustained because the evidence against him consisted solely of uncorroborated accomplice testimony. We agree.

[1, 2] Arkansas Code Annotated § 16-89-111(e)(1) (1987) (formerly Ark. Stat. Ann. § 43-2116 (Repl. 1977)) provides that a conviction cannot be had in the case of a felony on the testimony of accomplices unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. It requires more than testimony sufficient to show that the offense was committed. Evidence corroborating the testimony of an accomplice must tend to connect the accused with the crime and must be independent of the evidence given by the accomplice. Such corroborating evidence may be circumstantial so long as it is substantial, but need not be of such a substantial character as to support a conviction without the testimony of the accomplice. *Bly* v. *State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

[3] Although the trial court denied appellant's motion for a directed verdict on this ground, it instructed the jury that William and Vivian Smith were accomplices to the crime of delivery as a matter of law, and that appellant could not be convicted of delivery unless their testimony relating to the delivery in Randolph County was corroborated. However, there was no evidence to corroborate the testimony of William and Vivian Smith that the alleged delivery in Randolph County ever took place, much less any tending to connect Gerald Lee to it. Other than that of the Smiths, the only evidence of any delivery came from persons who testified that they saw a delivery by Lee in the Smith home, which was affirmatively shown to be in Jackson County, and a delivery to Smith in Craighead County. Neither of these deliveries, however, was the one for which appellant was tried and convicted. Accordingly, appellant Gerald Lee's conviction for delivery of a controlled substance must be reversed and dismissed.

While we are not in agreement with the trial court's statement that one who buys a controlled substance is an accomplice of a person who sells or delivers it as a matter of law,[1] no objection was made to the instruction when given and the State

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[1] *See Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971); *Barnes* v. *State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985); and *Brizendine* v. *State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982), which hold that one who accepts delivery of a controlled substance is not an accomplice of the deliverer.

does not argue on appeal that it was incorrect.

II. CONSPIRACY

[4, 5] Arkansas Code Annotated § 5-3-401 (1987) (formerly Ark. Stat. Ann. § 41-707 (Repl. 1976)) provides:

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:
>
> (1) He agrees with another person or other persons:
>
> (A) That one (1) or more of them will engage in conduct that constitutes that offense; or
>
> (B) That he will aid in the planning or commission of that criminal offense; and
>
> (2) He or another person with whom he conspires does any overt act in pursuance of the conspiracy.

Under this section, the State is required to prove both that there has been an agreement of the parties to commit the crimes and that one of the conspirators did at least a minimal act in furtherance of that agreement. *See Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987). Due to the very nature of a criminal conspiracy, the prosecution is seldom able to present direct evidence of the criminal agreement. It is, therefore, not necessary that a conspiracy to commit an unlawful act be shown by direct evidence. It may be proved by circumstances and the inferences drawn from the course of conduct of the alleged conspirators. *Griffin* v. *State*, 248 Ark. 1223, 455 S.W.2d 882 (1970); *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988).

[6, 7] The conspiracy may be inferred, even though no actual meeting among the parties is proved, if it be shown that two or more persons pursued by their acts the same unlawful object, each doing a part so that their acts that were apparently independent were in fact connected. *Griffin* v. *State*, *supra*. Where the combination of persons to do an unlawful act is shown, each of them is liable for the acts of the others acting in furtherance of the plan where it terminates in a criminal result. *Caton* v. *State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

A.

Both appellants contend that their convictions for conspiracy cannot be sustained because the evidence of William and Vivian Smith was not sufficiently corroborated. However, appellants do not argue at this juncture (and appellant Gerald Lee never does) that the corroborating testimony was not sufficient to establish the crime and their connection to it. They argue only that there was no corroboration that any overt act in furtherance of the conspiracy was committed in Randolph County. This argument must fail.

[8] Accomplice evidence of overt acts occurring within the county is not required to be corroborated. The corroboration required by § 16-89-111(e)(1) relates to the material facts that go to "the identity of the defendant in connection with the crime." *Gardner* v. *State*, 263 Ark. 739, 749, 569 S.W.2d 74, 79 (1978). The statute is directed toward proof of the criminal offense and not to venue or jurisdictional facts, for which corroboration is not required. *Id.*

[9-11] Moreover, although a person accused of criminal conduct is entitled to a jury trial in the county where the offense was committed, the State is not required to offer *any* proof that the offense was committed in the county of prosecution unless the evidence affirmatively shows that it was not. Ark. Code. Ann. § 5-1-111(b) (1987) (formerly Ark. Stat. Ann. § 41-110(2) (Repl. 1977)). Lack of proof that proper venue is in the county of prosecution is not the equivalent of an "affirmative showing." *Gardner* v. *State, supra; Johnson* v. *State*, 254 Ark. 703, 495 S.W.2d 845 (1973); *Baggett* v. *State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985). Under Ark. Code Ann. § 5-3-407 (1987) (formerly Ark. Stat. Ann. § 41-712 (Repl. 1977)), proper venue for a conspiracy prosecution is any county where an overt act in furtherance of the conspiracy is alleged to have occurred. Here, not only was there no affirmative showing that no overt act was committed in Randolph County, but the Smiths testified that appellants did commit overt acts there.

B.

Appellant Gerald Lee further contends that his conviction for conspiracy was contrary to the provisions of Ark. Code. Ann. §

5-1-110(a)(2) (1987) (formerly Ark. Stat. Ann. § 41-105(1)(b) (Repl. 1977)), because he could not be convicted of both conspiracy and the underlying substantive offense of delivery of a controlled substance. On the facts of this case, this argument must fail for at least two reasons.

In the first place, we conclude that the issue is moot. Appellant Gerald Lee no longer stands convicted for delivery of a controlled substance, as we have in this opinion reversed and dismissed that conviction on other grounds.

[12] However, in any event, § 5-1-110 does not prohibit convictions for both offenses in this case. That section provides that, when the same conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for all of the offenses but convicted of only one if one offense consists *only* of a conspiracy, solicitation, or an attempt to commit the other. The commentary to that section (found after Ark. Stat. Ann. § 41-105 (Repl. 1977)), which we find persuasive, states that the word "only" used in § 5-1-110(a)(2) refers to those conspiracies in which the consummated offense was the sole object of the conspiracy. It has no application to a conspiracy to commit a continuing series of offenses. The commentary states as an example: "[T]he person who agrees with others to engage in the continuing sale and distribution of drugs may be convicted of both conspiracy and a completed drug sale." Here, the evidence showed that the conspiracy contemplated the commission of a series of criminal acts, not merely the single transaction. There was testimony that, pursuant to the conspiracy, offenses involving at least $30,000.00 were committed in three or four counties over a period of time.

C.

Appellant Lora Lee contends that she could not be convicted of the crime of conspiracy because the only testimony connecting her with the conspiracy is that of William Smith and his wife, Vivian Smith, who she contends were "accomplices to the alleged conspiracy as a matter of law." We disagree.

[13, 14] Ordinarily, the question of whether a witness is an accomplice is a mixed question of fact and law and must be submitted to the jury where the evidence is in dispute. *Woodward*

v. *State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985); *Shrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984). Here, the jury was properly instructed on and had submitted to it the factual issue of whether or not various other witnesses were accomplices to the conspiracy. However, Vivian Smith's name was not included, nor requested to be included, in that instruction, and appellant requested neither a directed verdict on that issue nor an instruction naming Vivian Smith as an accomplice as a matter of law. Appellant contented herself by requesting a directed verdict on the "whole evidence." If she had desired an instruction or directed verdict on that issue, it was her duty to request it, and, failing to do so, she waived the issue of Vivian Smith's accomplice status and is in no position now to complain on this basis. *Trotter* v. *State*, 215 Ark. 121, 219 S.W.2d 636 (1949); *Morris* v. *State*, 197 Ark. 778, 126 S.W.2d 93 (1939).

[15, 16] In any event, although the evidence of William Smith establishes that he was a co-conspirator and accomplice to the alleged conspiracy as a matter of law, that of Vivian Smith stands in an entirely different posture. In view of her assertion that she did not participate in the selling of the drugs or the conspiracy, but merely accompanied her husband, the issue of whether she was an accomplice constituted at most a question of fact. On the evidence presented, the jury could have found that Vivian Smith was not an accomplice and that her testimony need not be corroborated. She testified to facts from which the jury could infer that appellant Lora Lee had been a participant in the conspiracy. Therefore, the testimony of Vivian Smith, standing alone, was sufficient to support the verdict as to appellant Lora Lee. It also served to fully corroborate William Smith's testimony.

III. ALLEGED TRIAL ERRORS

A.

Appellants called four character witnesses who gave both reputation and personal opinion evidence that appellants had good reputations in their community. The testimony was not restricted to appellants' reputations for truth and veracity but was directed at their reputations generally. On cross-examination, the State was permitted to ask these witnesses if they had heard that Gerald Lee had been convicted of burglary and theft

and had on other occasions threatened people's lives, once while holding a pistol to the person's head. The State also asked each of them if he had heard that Lora Lee had shot her husband five times. All but one of the witnesses testified that they were aware of all of those facts. The one remaining witness stated that he was aware of all but one of the facts. Appellants contend that this questioning was improper, irrelevant, and offered only for the purpose of inflaming the jury. We do not agree.

[17] Rules 404(a)(1) and 405(a) of the Arkansas Rules of Evidence permit an accused to initiate evidence of his character or a pertinent character trait by reputation or opinion evidence. However, when he puts his character in evidence, inquiry into relevant, specific instances of conduct is allowable on cross-examination. Ark. R. Evid. 405(a). The purpose of cross-examination of a character witness is not to attack the character or credibility of the accused, but to ascertain the witness's awareness of things having a bearing on the reputation for which the witness has vouched. The only limitation this rule places on cross-examination is that the facts inquired into be relevant to the issue of character. If the witness has never heard that the accused has previously been convicted of a crime or engaged in violent misconduct, then the witness's credibility suffers. If he has heard or knows of such facts but disregards them in forming his opinion or testifying to one's reputation, that may legitimately go to the weight to be given the opinion or reputation evidence. *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986). *See also* E. Cleary, *McCormick on Evidence* § 191, at 569 (3d ed. 1984).

[18] The witnesses testified that the appellants' reputations in the community were good, and, in their opinions, those reputations were earned. The fact that appellant Gerald Lee had been convicted of burglary and theft would certainly be relevant to those witnesses' opinions and bases for knowledge of his reputation for truth and veracity. The fact that both appellants had been engaged in acts or threats of violence would be relevant to the witnesses' opinions and knowledge of appellants' reputations for being law-abiding citizens. We find no error.

[19] Appellant Gerald Lee also contends, however, that the court should not have allowed the witnesses to be questioned about his conviction for burglary and theft because it was forty

years old and therefore irrelevant. We initially note that, when the questions concerning the conviction were asked and answered, appellant objected only on the grounds that the conviction was "more than ten years old." It was not until the close of the case that counsel for appellant asserted that the conviction was forty years old. While cross-examination of a witness about his own convictions that are more than ten years old is not allowed under Ark. R. Evid. 609, that rule has no application to the facts of this case. *See Reel* v. *State, supra.* This case is governed by Rule 405, which contains no such limitation but merely requires that the evidence be relevant. We cannot conclude that the character witnesses' knowledge of a conviction "more than ten years old" was irrelevant or that its probative value was substantially outweighed by the danger of unfair prejudice.

[20] Furthermore, documentary evidence of that conviction was not introduced. The witnesses were simply asked if they knew that appellant had been previously convicted. Appellant has not pointed out to us what in the record reflects when the conviction was obtained, or any other basis for his assertion that it occurred more than forty years ago. The burden is on the appellant to bring up a record and abstract thereof sufficient to demonstrate that the trial court was in error. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). We conclude that he has failed in that burden.

[21] Nor do we find merit in appellants' contention that the questions were not asked in good faith. As stated in *McCormick, supra*, this provision for cross-examination "is replete with possibilities for prejudice" and might result in the asking of questions which have no foundation in fact but which implant in the minds of the jury that insinuation or innuendo is true. It further recites the practice in many courts to have an in-chambers determination that the questions have some basis in fact before they are asked. While that was not done here, appellants' argument is hardly applicable to this case, because all but one witness admitted that he was aware of all of those matters about which the inquiries were made, and this negated any basis for an argument that the inquiries were merely suggestive or based on insinuation or innuendo. While one witness testified that he was not aware of one act, it was stated by appellants' own counsel that the information about which the prosecutor inquired was con-

tained in the file. It therefore was not a product of the prosecutor's imagination.

B.

While testifying about the mechanics of the conspiracy, William Smith testified that Gerald Lee had delivered Dilaudid as well as methamphetamine to him. Appellants objected on the grounds that they were not charged with delivery of Dilaudid but only with delivery of methamphetamine. The trial court found the evidence irrelevant to the charges of delivery but relevant to the charges of conspiracy. At the request of counsel for appellants, the trial court instructed the jury that it could not consider the testimony as evidence of the delivery with which appellants were charged but only as evidence as to the conspiracy. Appellants now contend that the evidence of a delivery of Dilaudid constituted evidence of "other bad acts" in violation of Ark. R. Evid. 404(b) because they were charged with conspiracy to deliver *methamphetamine*. The view we take of the case makes it unnecessary for us to address this argument on its merits.

[22, 23] This argument is based on the assumption that appellants were charged with conspiracy to deliver methamphetamine, not Dilaudid. However, a reading of the amended information shows this basic premise to be unfounded. Count One of the amended information charged appellants with conspiracy to deliver a "Schedule II controlled substance." Methamphetamine was never mentioned until the State, as required by Ark. Code Ann. § 16-89-112(b) (1987) (formerly Ark. Stat. Ann. § 43-2013 (Repl. 1977)), alleged overt acts done in furtherance of the conspiracy. Although that statute requires that a specific overt act be alleged in the information, *see Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987), it also clearly states that "overt acts other than those alleged in the indictment may be given in evidence on the part of the prosecution." Here, both methamphetamine and Dilaudid (hydromorphone) are Schedule II controlled substances, and, therefore, proof that appellant Gerald Lee delivered Dilaudid to Smith pursuant to the conspiracy was properly admitted as direct evidence of the conspiracy with which appellants were charged. The delivery of Dilaudid was not "other crimes evidence" but evidence of an overt act, other than that alleged in the information, done in

furtherance of the conspiracy.

C.

During the trial, appellants objected to leading questions propounded by the State on nine occasions. Each objection was sustained, and, on the sole occasion that counsel requested that an answer be stricken, that request was granted. At no other time was there a request that an answer be stricken, that counsel be admonished with regard to leading questions, or that any other action be taken by the court. For the first time on appeal, appellants urge that the trial court's failure to impose sanctions *sua sponte*, by striking questions, refusing to allow counsel to reask, holding counsel in contempt, or declaring a mistrial, warrants reversal of the case. We disagree.

[24] The trial court is vested with a wide latitude of discretion with regard to admission of leading questions, and its rulings will not be disturbed on appeal unless there has been an abuse of discretion. *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). We cannot agree with appellants' contention that the facts of this case are analogous to those presented in *Alexander* v. *Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986). There, a retrial was ordered because counsel repeatedly ignored the court's admonishments with regard to leading questions and the court refused to take any action on appellant's request that these prejudicial trial tactics be controlled. There were at least twenty-eight objections to questions which were framed in the form of statements of counsel and which in effect submitted his evidence to the jury rather than that of the witnesses. According to quotations from evidence contained in that opinion, there were many more leading questions asked by counsel to which no formal objection was interposed. The court constantly admonished counsel to cease the practice but to no avail. The appellant's motion that the court impose sanctions or strike the witnesses' testimony was refused, but the violations continued. The trial court conceded that it could not or would not take any action beyond the admonishment. The supreme court stated that it was presented with a unique situation in which the trial court was wholly unwilling or unable to control the improper conduct by counsel. The trial court was reversed for failing to take such action to correct this and other improper tactics of counsel, and

the matter was remanded for retrial.

[25] Here, the leading questions did not rise to the prejudicial level of those in *Alexander*, and in most instances were not a substitution of counsel's statements for witnesses' evidence. At most, several were repetition of the witnesses' testimony or correction of it in minor details. Appellants' counsel was content with the rulings he asked for and obtained on those objections, and no requests for admonishment of counsel or any other sanctions were made. While we agree that a trial court has an obligation to control trial tactics that tend to substitute counsel's evidence for that of his witness and leave the jury with prejudicial impressions, we cannot conclude that the conduct of trial counsel or the questions asked here reached the prejudicial level found in *Alexander*, or that the trial court otherwise committed prejudicial error by not acting *sua sponte* under the circumstances of this case. See also *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988).

Appellant Gerald Lee's conviction for delivery of a controlled substance is reversed and dismissed. Appellants' convictions for conspiracy are affirmed.

MAYFIELD and ROGERS, JJ., agree.